Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975.

No. 75-181

CHARLES N. HAVERLY AND RUTH L. HAVERLY,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered on March 20, 1975.

OPINIONS BELOW.

The opinion of the District Court for the Northern District of Illinois (Appendix A) is reported at 374 F. Supp. 1041 (1974). The opinion of the Court of Appeals for the Seventh Circuit (Appendix B), which reversed the judgment of the District Court for the Northern District of Illinois, is reported at 513 F. 2d 224 (1975).

JURISDICTION.

The judgment of the Court of Appeals (Appendix B) was entered on March 20, 1975, Petition for Rehearing denied on May 5, 1975 (Appendix C). Jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

THE QUESTION PRESENTED.

Whether the value of unsolicited sample textbooks sent by publishers to plaintiff, a principal of a public elementary school, and subsequently donated by him to the school's library, constitutes gross income for the principal within the meaning of Section 61 of the Internal Revenue Code either in the years he received the books or in the year he donated them or in the year that he filed his federal income tax return and claimed a charitable contribution deduction thereon?

CONSTITUTIONAL PROVISIONS, STATUTORY SECTIONS AND REVENUE RULINGS INVOLVED.

The pertinent portions of the United States Constitution, Amendment XVI, the Internal Revenue Code (26 U. S. C. § 61), and Internal Revenue Rulings 70-330, 70-498, and 75-194 are set forth in Appendix D. Section 170 of the Internal Revenue Code, 26 U. S. C. § 170, is not appended as it is not in question.

STATEMENT.

This is an action for the recovery of federal income taxes erroneously, illegally and improperly assessed and collected from the plaintiffs for the taxable year 1968. The United States District Court has jurisdiction by virtue of 28 U. S. C. § 1346(a)(1). The plaintiffs are individuals and their residence is in Chicago, Illinois, within the Northern District of Illinois, Eastern Division.

Mrs. Ruth L. Haverly joined in this action solely by virtue of having participated in filing a joint federal income tax return with Charles N. Haverly, her husband. Mr. Haverly, therefore, will be referred to hereinafter as the plaintiff.

All facts have been stipulated.

With respect to the charitable contribution deduction claimed on the plaintiff's 1968 federal income tax return (filed in 1969), the parties stipulated that the plaintiff is entitled to a deduction in the amount of $400.00 under Section 170 of the Internal Revenue Code of 1954.[1] Accordingly, the question of deductibility was not in issue before the United States District Court, the United States Court of Appeals for the Seventh Circuit, and is not in issue before this Court.

The case was submitted to the District Court on interrogatories and answers to interrogatories, a stipulation of facts, further stipulations between the parties and motions for summary judgment. The complete stipulation of uncontested facts is attached hereto as Appendix E.

These facts, as stipulated by the parties and found by the District Court, will be briefly summarized.

During the years 1967 and 1968, plaintiff was the principal of the Alice L. Barnard Elementary School in Chicago, under

1. 26 U. S. C. § 170. All references are to the Internal Revenue Code of 1954. As the taxable year involved is 1968, the effects of the Tax Reform Act of 1969 are not discussed herein but will be briefed if this petition is granted.

the jurisdiction of the Chicago Board of Education. In each of those years, plaintiff personally received from publishers of text books unsolicited sample copies of their publications having a fair market value at the time of receipt of $200.00 in each year. The samples were given by the publishers to the plaintiff for his personal retention or whatever disposition he saw fit to make. The purpose was to provide plaintiff, in the hope of receiving favorable consideration, an opportunity to study the books carefully at his convenience. The books were not intended by the publishers as compensation for the plaintiff.

In 1968, the plaintiff made a charitable contribution of the books to the school library. This transfer was without restriction and entitled the plaintiff to a charitable contribution deduction of $400.00 on his 1968 federal income tax return.

The District Court entered its Memorandum Opinion on January 9, 1974, and held that "Since there is no basis for the position that Congress intended to tax, as income, every unsolicited sample that is received and accepted by a taxpayer, we must grant plaintiff's motion for summary judgment." The District Court entered judgment for the plaintiff on January 25, 1974. The respondent timely filed a Notice of Appeal on March 25, 1974.

On appeal, the Court of Appeals reversed. The Court held that "* * * when the intent to exercise complete dominion over unsolicited samples is demonstrated by donating those samples to a charitable institution and taking a tax deduction therefore, the value of the samples received constitutes gross income."

REASONS FOR GRANTING THE WRIT.

1. The decisions of the courts below should be reviewed because said decisions involve a question of federal income tax law which has not been reviewed previously by this Court. In its opinion, the Court of Appeals stated, "This case presents for resolution a single question of law which is of first impression: whether the value of unsolicited sample textbooks sent by publishers to a principal of a public elementary school, which he subsequently donated to the school's library and for which he claimed a charitable deduction, constitutes gross income to the principal within the meaning of Section 61 of the Internal Revenue Code of 1954, 26 U. S. C. § 61."

There is no section of the Internal Revenue Code and it is the belief of the undersigned that there is no decision of this Court or of any other court holding that an item is not income upon receipt but becomes income upon a taxpayer's claiming a valid deduction (whether charitable contribution, depreciation, loss or any other kind) with respect to that item in a return filed in a subsequent taxable year.

2. It is further the belief of the undersigned that the Internal Revenue Service, if successful, intends to use this case as the basis for expanding tax revenues without first seeking Congressional approval.

The Commissioner of Internal Revenue originally issued Revenue Ruling 70-330, 1970-1 C. B. 14, which stated that the value of books received and accepted by a book reviewer during his employment with a newspaper is includable in his gross income. Thereafter, the Commissioner issued Revenue Ruling 70-498, 1970-2 C. B. 6, which superseded Revenue Ruling 70-330 and which states that the value of books accepted by a book reviewer during his employment with a newspaper and donated by him to a charitable organization is includable in his

gross income. The rationale of Revenue Ruling 70-498 apparently is the donation and claiming of a charitable contribution of a previously nontaxable item converts it into an item of gross income. It is submitted that such rationale is without support. (Would there have been income if the reviewer claimed the standard deduction?)

Revenue Ruling 75-194, Internal Revenue Bulletin No. 1975-21 (May 27, 1975), states that the taxpayer there is entitled to a charitable contribution deduction for the value of his share of the partnership assets transferred to a qualified charity, but interprets the gift as a bargain sale and imputes ordinary income to the taxpayer to the extent of partnership liabilities there present.

3. This case presents a unique question of Federal income tax law. The case does not involve the question of whether an item is a gift or is compensation [*Commissioner* v. *Duberstein*, 363 U. S. 278 (1960)], whether embezzled funds are income [*James* v. *United States*, 366 U. S. 213 (1961)], whether money received as exemplary damages for fraud or as punitive damages must be reported as gross income [*Commissioner* v. *Glenshaw Glass Co.*, 348 U. S. 426 (1955)], whether the taxation of a settlor with respect to "interest, rent, dividends, securities" is proper [*Helvering* v. *Clifford*, 309 U. S. 331 (1940)], or the manner in which there is to be a proper accounting for accrued interest [*Helvering* v. *Midland Mutual Life Ins. Co.*, 300 U. S. 216 (1937)].

4. The decision of the Court of Appeals is without basis in law, is in conflict with the established legal principle that the taking of a charitable contribution deduction does not give rise to income equal to the difference between the basis of the property and the value of the property contributed, and is at variance with the case of *Mason* v. *United States*, 513 F. 2d 25 (C. A. 7th 1975), affg. 365 F. Supp. 680 (N. D. Ill. 1973). The *Mason* case was decided after briefing and oral argument in the instant case before the Court of Appeals. The panel

of judges deciding *Mason* held that the taxpayer there was entitled to a charitable contribution deduction and was not considered to have received income for the difference between the market value of property donated to charity and the market value of a note received therefor. The government's argument that the receipt of the payments on the note should be treated as ordinary income under a tax benefit rule was rejected. The essential difference between *Haverly* and *Mason* is that Haverly (petitioner here) donated the full value of the books to a charitable organization while Mason made only a partial donation, the difference between the value of the shares and the value of the note received from the bargain sale to the charitable organization. In both cases, the government has admitted that the taxpayers are entitled to the charitable deduction. The government is trying to impute income where none exists. Where the tax laws do not provide for such imputation, it should not be allowed. *Edwards* v. *Cuba R. Co.*, 268 U. S. 628 (1925); *Gould* v. *Gould*, 245 U. S. 151 (1917); *United States* v. *Kaiser*, 363 U. S. 299 (1960).

There is nothing in Section 61 of the Internal Revenue Code to justify extension of the phrases "gross income" and "all income from whatever source derived" to include unsolicited promotional samples. Samples are not income whether discarded, used or donated to charity.

CONCLUSION.

For the reasons set forth above, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Counsel for Petitioners.

APPENDIX A.

UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

Name of Presiding Judge, Honorable Hubert L. Will

Cause No. 73 C 783 Date Jan. 9, 1974

Title of Cause Charles N. Haverly and Ruth L. Haverly vs. U. S. A.

Court this day files its memorandum opinion re cross motions for summary judgment. Plaintiffs' counsel to prepare judgment order consistent with Court's memorandum opinion and present same for entry within short date.

UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

CHARLES N. HAVERLY and
RUTH L. HAVERLY,
Plaintiffs,

vs.

UNITED STATES OF AMERICA,
Defendant.

73 C 783

MEMORANDUM OPINION

This action has been brought by plaintiff taxpayers for the recovery of certain income taxes paid to the United States Government. The jurisdiction of the court is asserted under 28 U.S.C. § 1346(a). The parties have entered into a stipulation of uncontested facts and have submitted their arguments on the legal question involved on briefs. For the reasons set forth below, judgment will be entered in favor of the plaintiff.[1]

During the years 1967 and 1968, plaintiff Charles N. Haverly was the principal of a public elementary school in the City of Chicago. During each of those two years, textbook publishers sent plaintiff unsolicited sample copies of their publications. For each of those years, all the textbooks received had an aggregate fair market value at the time of receipt of $200.

The purpose of sending the samples was to provide plaintiff with an opportunity to study the books to determine whether or not they might fit the purposes of the instructional units in his curriculum. No controls whatsoever were put on the use to

1. Ruth L. Haverly is a plaintiff in this action solely because the Haverlys filed a joint tax return. Consequently, the designation "plaintiff" will refer to Charles N. Haverly.

which plaintiff might put the texts. He was free to keep them or dispose of them as he saw fit. The parties have agreed that they were not intended to provide plaintiff with compensation for anything he had done in the past or would do in the future for the publishers. The books were in effect free samples of a product which the senders hoped plaintiff would recommend or purchase.

The parties have also agreed that the books were not gifts within the meaning of § 102 of the Internal Revenue Code of 1954,[2] as the clear motive of the publishers in sending the samples was their hope that the texts would receive favorable consideration, and that plaintiff might then order them for use at his school.

In 1968, plaintiff made a contribution of these books to the library of the school where he was principal. The transfer was without restriction and the defendant concedes that plaintiff was entitled to a charitable contribution deduction under § 170 of the Internal Revenue Code in the amount of $400, the value of the books at the time they were contributed.

In reporting his taxable income for the year 1968, plaintiff did not include the value of the textbooks received and donated during that year in his gross income, but did deduct the value of the books as a charitable contribution. Following an audit of his 1968 return, the Internal Revenue Service increased plaintiff's taxable income by the value of the textbooks, and assessed a deficiency in the amount of the tax resulting therefrom. Plaintiff paid the amount of the deficiency, filed a claim for a refund, and subsequently commenced this action to recover that amount.

The question raised is whether an individual has income when he receives and accepts unsolicited samples such as these textbooks. The position of the defendant is that once a person "manifests an intent on his part to accept such property" it is properly classified as taxable income. (Defendant's brief, p. 5). Here, defendant argues, the claiming of the charitable contribu-

2. All references to sections of the Internal Revenue Code are to the 1954 Code, as amended.

tion deduction on the income tax return evidences the requisite intent to accept the property, and therefore the value of the texts is includable in plaintiff's gross income. Plaintiff, on the other hand, contends that unsolicited samples cannot be considered income at any point. They are not, he urges, income when they are received, and they cannot be transformed into income by a particular subsequent use or disposition.

We find that the samples in question do not constitute income. Even if we had any doubt about the matter, we would have to follow the well-settled rule that, when doubt arises as to the taxability of an item, it must be resolved in favor of the taxpayer. *Gould* v. *Gould*, 245 U.S. 151 (1917); *Dunbar* v. *Commissioner of Internal Revenue*, 119 F.2d 367 (7th Cir. 1941); *Commissioner of Internal Revenue* v. *Swift & Co. E.B.A.*, 151 F.2d 625 (7th Cir. 1945).

First, it is clear that unsolicited samples do not fall within any of the specifically enumerated categories of the income sections of the Internal Revenue Code ("Code"). Section 61(a) of the Code provides:

> Except as otherwise provided in this subtitle, gross income means all income from whatever source derived, including (but not limited to) the following items:
>
> (1) Compensation for services, including fees, commissions, and similar items;
> (2) Gross income derived from business;
> (3) Gains derived from dealings in property;
> (4) Interest;
> (5) Rents;
> (6) Royalties;
> (7) Dividends;
> (8) Alimony and separate maintenance payments;
> (9) Annuities;
> (10) Income from life insurance and endowment contracts;
> (11) Pensions;
> (12) Income from discharge of indebtedness;

> (13) Distributive share of partnership gross income;
> (14) Income in respect of a decedent; and
> (15) Income from an interest in an estate or trust.

We are mindful of the caveat contained within the statute that the listing is not exclusive, as well as the rulings of the Supreme Court that §61(a) expresses a Congressional intent to exert "the full measure of its taxing power," *Commissioner* v. *Glenshaw Glass Co.*, 348 U.S. 426 (1955); *Helvering* v. *Clifford*, 309 U.S. 331, 334 (1940); *Helvering* v. *Midland Ins. Co.*, 300 U.S. 216 (1937) (construing language in one of § 61(a)'s predecessors). However, the finding of an intent to tax *all* income, "from whatever source derived," does not resolve the question of what constitutes income in the first place; and the categories contained in the statute itself are instructive of the types of things that are so considered. Unsolicited samples are not even arguably similar to any of the enumerated items.

Second, we can find no authority in any legal precedent which would support defendant's categorization of the samples as income. Neither our own research nor that of the parties has uncovered any ruling which even considers the issue of treating samples as income.

All of the cases cited by defendant are inapposite. The government's reliance on *Commissioner* v. *Duberstein*, 363 U.S. 278 (1960) is totally misplaced. That case dealt entirely with the issue of the definition of a "gift" as that term is used in § 22(b)(3) of the Internal Revenue Code. Here, the parties have stipulated that the sample textbooks were *not* gifts. Furthermore, the conclusion in *Duberstein* that the automobile was income, rather than a gift, was bottomed on a finding that it represented compensation to Duberstein for past services, and an inducement to be of further service in the future. 363 U.S. at 292. Compensation for services is one of the specifically enumerated items of income in § 61(a). Here, the parties have also stipulated that the textbooks did not represent compensation to the

plaintiff. Neither any language in nor any implications of the *Duberstein* opinion have any bearing on the issue of the definition of income *per se*.

Similarly, both the *Clifford* and *Midland Ins. Co.* cases, *supra,* dealt with questions of whether certain receipts fell within specifically enumerated categories of income contained in the Code, and are irrelevant to the determination of whether a category of items, which concededly does not fall within any of those enumerated provisions, constitutes income.

Finally, *Glenshaw Glass, supra,* cannot support defendant's position either. There, the Court dealt with the question of whether money received as exemplary damages for fraud, and the punitive two-thirds portion of a treble damage antitrust recovery must be reported as gross income. The Court's holding that such receipts, which were specifically requested and avidly pursued by the parties involved, did constitute taxable income has no bearing on the question before this court which deals with receipts which were completely involuntary and which would require positive action on the part of the recipient to avoid.

Third, we are not persuaded by defendant's use of Revenue Ruling 70-498, as an appropriate analogy. That ruling provides that the value of books accepted by a book reviewer during his employment with a newspaper and donated by him to a charitable organization is includable in his gross income. This ruling suffers the same infirmity as the government's position in this case, as discussed below. Moreover, to the extent that a reviewer utilizes such books in his business, they constitute tools of his trade and are distinguishable from the book samples here involved.

Defendant concedes that income cannot be foisted upon an individual involuntarily, and recognizes that that is exactly the situation for the vast majority of unsolicited samples that are sent to people not only in plaintiff's position, but to consumers of all kinds: housewives, doctors, lawyers, book reviewers, retailers, etc. They are not considered income both because of their

usually negligible value, and because of the inequity of requiring the unwitting and involuntary recipient to take positive action to avoid such receipts in order to avoid tax consequences. It simply does not comport with the notions underlying the tax laws to treat as income something the taxpayer never asked for, may not want, and which may require considerable effort to avoid or return.

However, perhaps bothered by the fact that certain of these unsolicited samples can be used by the recipient to take advantage of other provisions in the tax laws such as the charitable contribution deduction, the government feels that certain of those items must be construed as income. The taxpayer, it urges, cannot have his cake and eat it too. The proposed line to be drawn between "involuntary" and "voluntary" receipts is that the item will not be considered income unless the recipient "manifests an intent . . . to accept such property." Apparently, however, the only act deemed by the Service to manifest the requisite intent is the act of claiming a charitable contribution deduction. Certainly such an act does evidence an intent to accept the property as one's own. The problem is that such an intent is equally as clearly evidenced when the housewife uses the detergent sample for the family wash, or when the book reviewer takes the book for his own personal library, or when the store customer swallows the new brand of cracker being promoted, or when the school principal donates his sample texts to the school library *without* claiming any deduction, or when a judge receives books from a publisher and puts them on the shelves in his chambers for possible future reference.

Obviously, in terms of the government's own standard, these other situations are indistinguishable. The Internal Revenue Service is forced to ignore this inconsistency, however, because of the absurdity of labeling all these items as "income." In practice, this inconsistent treatment may not present tax problems because the value of most samples is so negligible that no one claims a deduction for them even if they are donated to char-

itable institutions. But clearly a distinction based on the value of the sample, or on the particular way in which a recipient converts it to his or her own use, is not acceptable as a matter of law based on any applicable tax provision, precedent or logic. In the absence of a Congressional directive otherwise, *all* unsolicited samples must either be considered income or not income and we find they are not income. If it would be more equitable to make distinctions as to tax treatment based on an item's value, its subsequent disposition, or the manner in which it was acquired, that is a matter for the Congress to decide, not the courts.

Since there is no basis for the position that Congress intended to tax, as income, every unsolicited sample that is received and accepted by a taxpayer, we must grant plaintiff's motion for summary judgment. Defendant's motion for summary judgment will be denied. An appropriate order will enter.

HUBERT L. WILL
United States District Judge

Dated: January 9, 1974

APPENDIX B.

OPINION BY JUDGE HASTINGS

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

March 20, 1975

Before

Hon. John S. Hastings, *Senior Circuit Judge*
Hon. Luther M. Swygert, *Circuit Judge*
Hon. Walter J. Cummings, *Circuit Judge*

CHARLES N. HAVERLY and
RUTH L. HAVERLY,
Plaintiffs-Appellees,

No. 74-1457 *vs.*

UNITED STATES OF AMERICA,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, REVERSED and REMANDED, with costs, in accordance with the opinion of this court as of this date.

IN THE

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

No. 74-1457

CHARLES N. HAVERLY and RUTH L. HAVERLY,

Plaintiffs-Appellees,

vs.

UNITED STATES OF AMERICA,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division—No. 73 C 783

Hubert L. Will, *Judge.*

ARGUED JANUARY 10, 1975—DECIDED MARCH 20, 1975

Before HASTINGS, *Senior Circuit Judge,* SWYGERT and CUMMINGS, *Circuit Judges.*

HASTINGS, *Senior Circuit Judge.* This case presents for resolution a single question of law which is of first impression: whether the value of unsolicited sample textbooks sent by publishers to a principal of a public elementary school, which he subsequently donated to the school's library and for which he claimed a charitable deduction, constitutes gross income to the principal within the meaning of Section 61 of the Internal Revenue Code of 1954, 26 U.S.C. § 61.

This action was brought by the plaintiffs in the district court for recovery of income taxes paid to the United States. Juris-

diction was based on 28 U.S.C. § 1346(a)(1). The parties stipulated to the relevant facts.

During the years 1967 and 1968 Charles N. Haverly[1] was the principal of the Alice L. Bernard Elementary School in Chicago, Illinois. In each of these years publishers sent to the taxpayer unsolicited sample copies of textbooks which had a total fair market value at the time of receipt of $400. The samples were given to taxpayer for his personal retention or for whatever disposition he wished to make. The samples were provided, in the hope of receiving favorable consideration, to give taxpayer an opportunity to examine the books and determine whether they were suitable for the instructional unit for which he was responsible. The publishers did not intend that the books serve as compensation.

In 1968 taxpayer donated the books to the Alice L. Barnard Elementary School Library. The parties agreed that the donation entitled the taxpayer to a charitable deduction under 26 U.S.C. § 170, in the amount of $400, the value of the books at the time of the contribution.[2]

The parties further stipulated that the textbooks received from the publishers did not constitute gifts within the meaning of 26 U.S.C. § 102 since their transfer to the taxpayer did not proceed from a detached and disinterested generosity nor out of affection, respect, admiration, charity or like impulses.

Taxpayer's report of his 1968 income did not include the value of the textbooks received, but it did include a charitable deduction for the value of the books donated to the school library. The Internal Revenue Service assessed a deficiency against the taxpayer representing income taxes on the value of

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1. References to the taxpayer are to the husband alone. Ruth L. Haverly is a party to this appeal solely because she filed a joint income tax return with her husband for the taxable year 1968.

2. Since the tax year at issue in this litigation is 1968, the amount of the charitable deduction which could be taken was unaffected by 26 U.S.C. § 170(e)(1) which was added by the Tax Reform Act of 1969, Pub. L. No. 91-172, 83 Stat. 487.

the textbooks received. Taxpayer paid the amount of the deficiency, filed a claim for refund and subsequently instituted this action to recover that amount.[3]

The amount of income, if any, and the time of its receipt are not issues here since the parties stipulated that if the contested issue of law was decided in the taxpayer's favor, his taxable income for 1968 as determined by the Internal Revenue Service would be reduced by $400.00.

Upon agreement of the parties, the case was submitted to the district court on the uncontested facts and briefs for decision without trial. The district court issued a memorandum opinion which held that receipt of the samples did not constitute income. *Haverly* v. *United States,* N.D. Ill., 374 F. Supp. 1041 (1974). The court subsequently ordered, in accordance with its decision, that plaintiffs recover from the United States the sum of $120.40 plus interest. The United States appeals from that judgment. We reverse.

Section 61(a) of Title 26 of the United States Code provides: "Except as otherwise provided in this subtitle, gross income means all income from whatever source derived, including (but not limited to) the following items:" The section thereafter enumerates fifteen items none of which, the government concedes, encompass the receipt of sample textbooks. The taxpayer concedes that receipt of the books does not fall within any of the specific exclusions from gross income set out in Sections 101 through 124 of Title 26. The only question remaining is whether the value of the textbooks received is included within "all income from whatever source derived."

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3. Taxpayer originally sought a refund of $288.76 and sought to recover that amount in this action. This amount reflected taxpayer's contentions that the books were not income and that he was entitled to a charitable deduction for $430 worth of books which had been given directly to the school by the publishers. In proceedings in the district court, taxpayer conceded that he was not entitled to a deduction for the books which the publishers had sent to the school.

The Supreme Court has frequently reiterated that it was the intention of Congress "to use the full measure of its taxing power" and "to tax all gains except those specifically exempted." *James* v. *United States,* 366 U.S. 213, 218-219 (1961). The Supreme Court has also held that the language of Section 61(a) encompasses all "accessions to wealth, clearly realized, and over which the taxpayers have complete dominion." *Id.* at 219; *Commissioner* v. *Glenshaw Glass Co.,* 348 U.S. 426, 431 (1955).

There are no reported cases which have applied these definitions of income to the question of the receipt of unsolicited samples. The parties have cited to the court a number of cases applying income definitions to other fact situations. We have considered these cases, but we find them of no particular assistance in resolving the question before us. In view of the comprehensive conception of income embodied in the statutory language and the Supreme Court's interpretation of that language, we conclude that when the intent to exercise complete dominion over unsolicited samples is demonstrated by donating those samples to a charitable institution and taking a tax deduction therefor, the value of the samples received constitutes gross income.

The receipt of textbooks is unquestionably an "accession to wealth." Taxpayer recognized the value of the books when he donated them and took a $400 deduction therefor. Possession of the books increased the taxpayer's wealth. Taxpayer's receipt and possession of the books indicate that the income was "clearly realized." Taxpayer admitted that the books were given to him for his personal retention or whatever disposition he saw fit to make of them. Although the receipt of unsolicited samples may sometimes raise the question of whether the taxpayer manifested an intent to accept the property or exercised "complete dominion" over it, there is no question that this element is satisfied by the unequivocal act of taking a charitable deduction for donation of the property.

The district court recognized that the act of claiming a charitable deduction does manifest an intent to accept the property as one's own. It nevertheless declined to label receipt of the property as income because it considered such an act indistinguishable from other acts unrelated to the tax laws which also evidence an intent to accept property as one's own, such as a school principal donating his sample texts to the library *without* claiming a deduction. We need not resolve the question of the tax consequences of this and other hypothetical cases discussed by the district court and suggested by the taxpayer. To decide the case before us we need only hold, as we do, that when a tax deduction is taken for the donation of unsolicited samples the value of the samples received must be included in the taxpayer's gross income.

This conclusion is consistent with Revenue Ruling 70-498, 1970-2 CUM. BULL. 6, in which the Internal Revenue Service held that a newspaper's book reviewer must include in his gross income the value of unsolicited books received from publishers which are donated to a charitable organization and for which a charitable deduction is taken. This ruling was issued to supercede an earlier ruling, Rev. Rul. 70-330, 1970-1 CUM. BULL. 14, that mere retention of unsolicited books was sufficient to cause them to be gross income.[4]

The Internal Revenue Service has apparently made an administrative decision to be concerned with the taxation of unsolicited samples only when failure to tax those samples would provide taxpayers with double tax benefits. It is not for the courts to quarrel with an agency's rational allocation of its administrative resources.

4. The district court considered Revenue Ruling 70-498 distinguishable from the facts of the instant case on the ground that, for the book reviewer, the books were the tools of his trade. The district court did not explain why "tools of the trade" should be a significant factor in determining what is income, but even if it were, textbooks would seem to be a tool of the trade of being a school principal. The facts here indicate that it was one of taxpayer's functions as a principal to review sample textbooks to determine their suitability for his students.

In light of the foregoing, the judgment appealed from is reversed and the case is remanded to the district court with directions to enter judgment for the United States.

REVERSED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX C.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

May 5, 1975.

Before

Hon. JOHN S. HASTINGS, *Sr. Circuit Judge*
Hon. LUTHER M. SWYGERT, *Circuit Judge*
Hon. WALTER J. CUMMINGS, *Circuit Judge*

CHARLES N. HAVERLY AND RUTH L. HAVERLY, *Plaintiffs-Appellees,* vs. UNITED STATES OF AMERICA, *Defendant-Appellant.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Divsn. (73 C 783)

No. 74-1457

On consideration of the petition for rehearing and suggestion that it be heard *en banc* filed in the above-entitled cause, no judge in active service having requested a vote thereon, nor any judge having voted to grant the suggestion, and all of members of the panel (or majority) having voted to deny a rehearing.

IT IS ORDERED that the petition for a rehearing in the above-entitled cause be, and the same is hereby, DENIED.

APPENDIX D.

CONSTITUTIONAL PROVISIONS INVOLVED

Article I, Section 8, Clause 1.

Section 8, Clause 1. Powers of Congress; levy of taxes for common defense and general welfare; uniformity of taxation

The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States.

Amendment XVI

The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.

INTERNAL REVENUE CODE PROVISIONS INVOLVED

26 U. S. C. § 61 (a)

Section 61(a) of the Internal Revenue Code provides as follows: "Sec. 61. GROSS INCOME DEFINED.

(a) General Definition-Except as otherwise provided in this subtitle, gross income means all income from whatever source derived, including (but not limited to) the following items:

(1) Compensation for services, including fees, commissions, and similar items;
(2) Gross income derived from business;
(3) Gains derived from dealings in property;
(4) Interest;
(5) Rents;
(6) Royalties;
(7) Dividends;
(8) Alimony and separate maintenance payments;

(9) Annuities;

(10) Income from life insurance and endowment contracts;

(11) Pensions;

(12) Income from discharge of indebtedness;

(13) Distributive share of partnership gross income;

(14) Income in respect of a decedent; and

(15) Income from an interest in an estate or trust."

REVENUE RULINGS INVOLVED

REVENUE RULING 70-330, 1970-1 CUM. BULL. 14.

Advice has been requested whether the value of books accepted by a book reviewer under the following circumstances is includible in his gross income.

The taxpayer is employed by a newspaper as its book reviewer. During the taxable year various publishing firms sent him copies of books without charge with the hope he would publish reviews of them in the newspaper. The taxpayer did not solicit the books. Some of the books were accepted and retained by the taxpayer; the others were returned. The books became the property of the taxpayer.

Section 61(a) of the Internal Revenue Code of 1954 defines gross income as income from whatever source derived, unless specifically excluded by other provisions of the Code. Section 1.61-1(a) of the Income Tax Regulations provides, in part, that gross income includes income realized in any form, whether in money, property, or services.

It is well established that gross income is not limited to cash received, but may also include the fair market value of property received. In *Commissioner* v. *Glenshaw Glass Company*, 348 U. S. 426 (1955), Ct. D. 1783, C. B. 1955-1, 207, the

Supreme Court of the United States recognized that Congress in defining gross income intended to exert the full measure of its taxing power and to tax all gains without limitation as to their source, except those specifically exempted.

Accordingly, since the value of the books is not excludable from the taxpayer's gross income by any provision of the Code, and in view of the broad scope of section 61(a) of the Code, the value of the books received and accepted by the taxpayer is includible in his gross income.

REVENUE RULING 70-498, 1970-2 CUM. BULL. 6.

Advice has been requested whether the value of books accepted by a book reviewer under the circumstances described below is includible in his gross income.

The taxpayer is employed by a newspaper as its book reviewer. During the taxable year 1968 various publishing firms sent him 2500 books without charge with the hope he would publish reviews of them in the newspaper. The taxpayer did not solicit the books. During the same year the taxpayer donated the 2500 books to a charitable organization. He claimed a contribution deduction for their value.

Section 61(a) of the Internal Revenue Code of 1954 defines gross income as income from whatever source derived, unless specifically excluded by other provisions of the Code. Section 1.61-1(a) of the Income Tax Regulations provides, in part, that gross income includes income realized in any form, whether in money, property, or services.

It is well established that gross income is not limited to cash received, but may also include the fair market value of property received. In *Commissioner* v. *Glenshaw Glass Company*, 348 U. S. 426 (1955), Ct. D. 1783, C. B. 1955-1, 207, the Supreme Court of the United States recognized that Congress in defining gross income intended to exert the full measure of

its taxing power and to tax all gains without limitation as to their source, except those specifically exempted.

Accordingly, under the specific facts described above the value of these books is includible in the taxpayer's gross income.

Revenue Ruling 70-330, C. B. 1970-1, 14 is hereby superseded.

REVENUE RULING 75-194, 1975-21 INT. REV. BULL.

Advice has been requested concerning the Federal income tax consequences of the contribution of an interest in a limited partnership to a charitable organization in the situation described below.

L became a limited partner in partnership *CL* on its formation in 1971. In 1974, *L* contributed his entire limited partnership interest to a charitable organization described in section 170(c) of the Internal Revenue Code of 1954. On that date all of the partnership liabilities were liabilities on which neither *L*, the other partners, nor the partnership had assumed any personal liability. Also on that date, *L*'s proportionate share of the value of the partnership assets was greater than his proportionate share of the partnership liabilities and because of partnership losses *L*'s adjusted basis for his partnership interest was less than his proportionate share of the partnership liabilities. At the time of the contribution the partnership had no unrealized receivables or inventory items described in section 751.

Section 170(a) of the Code provides the general rule that there shall be allowed as a deduction any "charitable contribution" (as defined in section 170(c)) payment of which is made within the taxable year.

Section 1.170A-1(c) of the Income Tax Regulations provides, in part, that if a contribution is made in property other than money, the amount of the contribution is the fair market

value of the property at the time of the contribution reduced as provided in section 170(c)(1) of the Code.

Section 741 of the Code provides, in pertinent part, that in the case of a sale or exchange of an interest in a partnership, gain or loss shall be recognized to the transferor partner and shall be considered gain or loss from the sale or exchange of a capital asset, except as otherwise provided in section 751.

Section 752(c) of the Code provides that for purposes of section 752, a liability to which property is subject shall, to the extent of the fair market value of such property, be considered as a liability of the owner of the property.

Section 1.752-1(e) of the regulations provides, in part; that where none of the partners have any personal liability with respect to a partnership liability (as in the case of a mortgage on real estate acquired by the partnership without assumption by the partnership or any of the partners of any liability on the mortgage), then all partners, including limited partners, shall be considered as sharing such liability under section 752(c) of the Code in the same proportion as they share the profits.

Section 752(d) of the Code and section 1.752-1(d) of the regulations provide that where there is a sale or exchange of an interest in a partnership, liabilities shall be treated in the same manner as liabilities in connection with the sale or exchange of property not associated with partnerships. For example, if a partner sells his interest in a partnership for $750 cash and at the same time transfers to the purchaser his share of partnership liabilities amounting to $250, the amount realized by the seller on the transaction is $1,000. See also Rev. Rul. 74-40, 1974-1 C. B. 159.

Section 1011(b) of the Code provides the rules for allocating adjusted basis in the case of a "bargain sale" to a charitable organization where a deduction is allowable under section 170 by reason of such sale. Section 1.170A-4(c)(2)(iii) of the regulations defines a "bargain sale" as a transfer of property which

is in part a sale or exchange of the property and in part a charitable contribution, as defined in section 170(c), of the property. Sections 1.170A-4(c) and 1.1011-2 contain rules and examples with respect to the computation of gain and the amount of the charitable contribution in the case of a "bargain sale."

Section 1.1011-2(a)(3) of the regulations provides that if property is transferred subject to an indebtedness, the amount of the indebtedness must be treated as an amount realized for purposes of determining whether there is a sale or exchange to which section 1011(b) of the Code and section 1.1011-2 apply, even though the transferee does not agree to assume or pay the indebtedness.

Since the value of *L*'s share of the partnership assets at the time he transferred his partnership interest exceeded his share of partnership liabilities at that time, a charitable contribution deduction is allowable under section 170 of the Code, subject to the reductions and limitations set forth therein. At the same time, pursuant to sections 752(d) and 1011(b), the amount of *L*'s share of partnership liabilities at the time of the transfer constitutes an amount realized by *L*. Based on the foregoing, a bargain sale within the meaning of sections 170 and 1011(b) has occurred.

Accordingly, in the instant case, *L* has a recognized gain on the transfer equal to the excess of the amount realized by *L* over that portion of the adjusted basis of *L*'s partnership interest (at the time of the transfer) allocable to the sale under section 1011(b) of the Code. Since the partnership had no unrealized receivables or appreciated inventory items described in section 751, the gain is considered a gain from the sale of a capital asset under section 741.

APPENDIX E.

IN THE UNITED STATES DISTRICT COURT FOR THE
Northern District of Illinois
Eastern Division

CHARLES N. HAVERLY and
RUTH L. HAVERLY,
Plaintiffs,

vs.

UNITED STATES OF AMERICA,
Defendant.

Civil Action
No. 73-C-783

STIPULATION OF UNCONTESTED FACTS

1. This is an action for the recovery of Federal income taxes. The court has jurisdiction by virtue of 28 U. S. C., Section 1346(a)(1).

2. During the years 1967 and 1968, Charles N. Haverly, hereinafter referred to as the plaintiff, was the principal of the Alice L. Barnard Elementary School in Chicago. This school is under the jurisdiction of the Chicago Board of Education. During each of those years, publishers of textbooks sent unsolicited sample copies of their publications to the plaintiff.

3. In each of the years 1967 and 1968, the plaintiff personally received textbooks having a fair market value at the time of receipt of $200 in each year. These samples were given by the publishers to the plaintiff for his personal retention or for whatever disposition he saw fit to make of said sample copies. The purpose of the sampling was to provide the plaintiff, in the hope of receiving favorable consideration, an opportunity to study the books carefully at his convenience to determine how

well they would fit the purposes of the instructional unit for which he was responsible. The books were not intended by the publishers as compensation for the plaintiff.

4. In 1968, the plaintiff made a charitable contribution of the foregoing books to the Alice L. Barnard Elementary School Library. This transfer was without restriction and entitles the plaintiff in 1968 to a charitable contribution deduction of $400, the value of the books at the time they were contributed in 1968, under Section 170 of the Internal Revenue Code of 1954.

5. In addition to the sample publications set out above, publishers sent additional samples directly to the Alice L. Barnard Elementary School and not to the plaintiff. These publications had a value of $430 in 1968. Plaintiff is not entitled to any charitable deduction with respect to books given directly to the school by publishers.

6. The textbooks which the plaintiff received from the publishers in each of the years 1967 and 1968 did not constitute gifts within the meaning of Section 102 of the Internal Revenue Code of 1954. The transfer of books from the publishers to the plaintiff did not proceed from a detached and disinterested generosity nor out of affection, respect, admiration, charity or like impules.

STIPULATED TO:

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Supreme Court, U. S.
FILED
SEP 29 1975
MICHAEL RODAK, JR., CLERK

No. 75-181

In the Supreme Court of the United States

OCTOBER TERM, 1975

CHARLES N. HAVERLY AND RUTH L. HAVERLY,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1975

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CHARLES N. HAVERLY AND RUTH L. HAVERLY,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The sole issue raised by the petition in this federal income tax case is whether the value of sample textbooks sent by publishers to petitioner [1] was includable in his gross income under Section 61 of the Internal Revenue Code of 1954, when he accepted those textbooks and exercised dominion over them by donating them to a school library and claiming a charitable deduction on account of the gift. Petitioner acknowledges (Pet. 5) that the court of appeals correctly char-

[1] "Petitioner" refers to Charles N. Haverly. Ruth L. Haverly is a party solely because she filed a joint return with her husband for the year in issue.

acterized the question as one "of first impression" (Pet. App. A10).

Petitioner was the principal of a public elementary school in Chicago, Illinois, during the years 1967 and 1968. Publishers sent petitioner unsolicited sample copies of textbooks in these years with a stipulated total fair market value of $400 at the time of receipt. The samples were provided to petitioner in order that he could examine the books and determine whether they were appropriate for use in the instructional unit for which he was responsible. The publishers did not intend the books to be compensation, nor were they gifts within the meaning of Section 102 of the Code (Pet. App. A11).

In 1968, petitioner donated the books to the library at his school. On his 1968 income tax return, he claimed a charitable deduction of $400 for the gift, but never included the value of the books in his income. The Commissioner conceded petitioner's right to a charitable deduction for the gift to the school library, but determined that the value of these books should have been included in income and assessed a deficiency accordingly.

In this suit for refund, the district court held that the value of the sample textbooks sent to petitioner was not income (Pet. App. A2 to A8). The court of appeals reversed, holding that the value of these books constituted income to petitioner under Section 61 of the Code (Pet. App. A13 to A15).

Section 61 provides that, subject to certain exceptions which are concededly not applicable here, "gross income means all income from whatever source de-

rived * * *." This Court has held that "this language was used by Congress to exert in this field 'the full measure of its taxing power,'" and thus "to tax all gains except those specifically exempted." *Commissioner* v. *Glenshaw Glass Co.*, 348 U.S. 426, 429–430; *James* v. *United States*, 366 U.S. 213, 219. In keeping with this broad statutory language, this Court has defined income under Section 61 to include all "accessions to wealth, clearly realized, and over which the taxpayers have complete dominion." *Commissioner* v. *Glenshaw Glass Co., supra*, 348 U.S. at 431.[2]

Petitioner here "realized" just such an "accession to wealth" when he received the textbooks. The publishers who sent the books attached no conditions to their transfer and petitioner exercised complete dominion over these books when he transferred them to the school library.[3] Petitioner's claim of a $400 chari-

[2] Petitioner argues (Pet. 6–7) that the decision below conflicts with *Mason* v. *United States*, 513 F. 2d 25 (C.A. 7). However, *Mason* involved the different question whether the difference between the value of a business transferred to a charity and the present value of the note given by the charity as consideration for the transfer was deductible as a charitable contribution and whether the charity's subsequent payments on the note would constitute income to the transferors under certain tax benefit theories. Moreover, even if there were a conflict between *Mason* and this case, it should be resolved by the Seventh Circuit and not by this Court. *Western Pacific R.R. Corp.* v. *Western Pacific R.R. Co.*, 345 U.S. 247, 260, n. 20; *Wisniewski* v. *United States*, 353 U.S. 901, 902.

[3] Contrary to petitioners' contention (Pet. 5), the court of appeals did not hold that his claim of a charitable deduction gave rise to income. Rather, the court held (Pet. App. A13) that the claim of the charitable deduction showed that petitioner had exercised dominion over the books, and thus "realized" the income represented by their value.

table deduction for this gift shows that the court of appeals correctly concluded that the books constituted an accession to his wealth, which was includable in his gross income.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

SEPTEMBER 1975.

U.S. GOVERNMENT PRINTING OFFICE: 1975